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No. 94-1104

Supreme Court, U.S.
FILED
FEB 22 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

BW PARKWAY ASSOCIATES PARTNERSHIP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly determined that the actions of the National Security Agency did not prevent petitioner from developing its property so as to effect a temporary taking.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. B1-B2) is unpublished, but the decision is noted at 36 F.3d 1116 (Table). The opinion of the Court of Federal Claims (Pet. App. A1-A43) is reported at 29 Fed. Cl. 669.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on September 15, 1994. The petition for a writ of certiorari was filed on December 13, 1994. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of a condemnation of property by the National Security Agency (NSA), an agency of the United States Department of Defense. In 1987, the NSA condemned a 260-acre tract adjoining Fort Meade, the NSA's facility in Anne Arundel County, Maryland. The NSA paid more than $21 million to the landowner, petitioner Baltimore-Washington Parkway Associates (BWPA). BWPA subsequently brought this inverse condemnation action seeking $300 million in additional compensation. Petitioner alleged that the NSA's actions during the 20 years preceding the condemnation had prevented it from developing the property and had thereby effected a temporary taking. The Court of Federal Claims concluded that no temporary taking had occurred. Pet. App. A1-A43. The court of appeals affirmed without opinion. Pet. App. B1-B2.

1. Until it was condemned in 1987, the parcel of land under dispute was amassed and owned by petitioner as a potential site for commercial and residential development. The land was primarily zoned for residential use but was largely unoccupied. Pet. App. A3-A4. When petitioner began to amass the parcel, the NSA grew concerned that private development of the tract would compromise the security of NSA operations. *Id.* at A5. The agency became interested in maintaining the property as a sparsely developed buffer zone for its headquarters. *Id.* at A6, A10. To that end, beginning in 1968, the government attempted to acquire the land for cash or by exchange for government-owned real estate. *Id.* at A11. The NSA's efforts in 1970 and 1971 to acquire roughly 75 acres were thwarted when it could not obtain full funding for the purchase. *Ibid.* In 1972, the NSA attempted to secure an aerial easement over some 136

acres, but the values that petitioner and NSA attached to the property differed radically. *Id.* at A12-A13. The government subsequently concluded that petitioner's prospects for development of the land were uncertain; it therefore decided to cease its negotiations with petitioner but to remain alert to and work to prevent any proposed, feasible developments. *Ibid.*; C.A. App. 839-845.

NSA representatives spoke to county officials in opposition to the planned development early in the 1970s. Pet. App. A11-A12. Starting in the late 1970s, NSA representatives also attended meetings with state officials and advised state highway planners regarding a new freeway project. *Id.* at A14-A17. Petitioner and the NSA were at odds over whether Route 32 could accommodate traffic from both the NSA complex and petitioner's proposed development. *Id.* at A14, A16.

2. Petitioner's efforts to develop its property were halting. Petitioner faced multiple limitations, such as the fact that the large-scale mixed-use development that it envisioned in the 1970s required public water and sewer systems, which were never available at the property in question. See C.A. App. 402a, 614, 654a-654b, 2064-2070. Rather, the planning area in which the tract was located was one in which developers were required by the county to furnish those services. *Id.* at 654a-654b. As early as 1967, petitioner hired engineers to seek ways to provide the necessary on-site water and sewer systems to serve their proposed development. *Id.* at 402a, 630a, 742-743. Petitioner never pursued this option, however. *Id.* at 643a-643b. In 1971, petitioner obtained

"sketch plan"[1] approval for proposed development but allowed it to lapse by not preparing a preliminary plan. Pet. App. A7-A8. In 1974, petitioner received approval from the county to build a private on-site sewer and water system which would have permitted development of 150 apartment units and one 75,000-square-foot office building. C.A. App. 402b, 625, 2063. That permit was also allowed to lapse. *Id.* at 402c, 643b. In 1979, petitioner again submitted a sketch plan proposal, which was approved the following year. Pet. App. A8. Petitioner first received a building permit in May 1986. *Id.* at A8-A9.

Also in 1986, petitioner became a member of the Russett Joint Venture, a group that negotiated a water and sewer agreement among several property owners and the county whereby the developers agreed to build a new waste water treatment plant and to connect trunk lines to their properties at their own expense in order to proceed with their developments. See Pet. App. A9; C.A. App. 396a, 627. Petitioner's expert stated that this option was economically sound. *Id.* at 628. Under the plan, petitioner was to pay approximately $5.5 million out of a total cost in excess of $20 million; however, it never put up its share of the required funds. *Id.* at 643c-643d. Consultants' reports and expert testimony indicated that, at the time of the condemnation, it would still have taken petitioner several years to complete the lines needed to serve its development. Pet. App. A9.

3. A November 1985 letter from petitioner announcing its intention to begin construction prompted the government's decision to condemn the land. See Pet. App. A18; C.A. App. 2075-2077. Petitioner "informed NSA of [its]

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[1] "Sketch plan" approval was the first of three required steps in Anne Arundel County's process for reviewing and approving planned developments. See Pet. App. A7 n.3.

eventual intent to construct an office park of up to 5 million square feet[.] * * * The proposed construction concern[ed] NSA because it entail[ed] buildings of such height * * * as to permit technical exploitation of NSA operations." C.A. App. 2075. The NSA promptly sent petitioner a letter expressing its intention to buy the property. *Id.* at 1655; Pet. App. A18. Approximately a year later the NSA obtained approval of the acquisition and a $9.7 million appropriation from congressional committees. *Id.* at A20. The NSA and petitioner negotiated for the sale of the property but could not agree on valuation; negotiations reached an impasse in July 1987. *Ibid.*

On October 19, 1987, the United States filed a complaint and declaration of taking in the United States District Court for the District of Maryland. *United States* v. *255.21 Acres*, Civ. No. WN-87-2810. After nine days of trial, the parties ultimately agreed on the value of the property as of the taking date (October 19, 1987). As a result, petitioner was awarded $21,747,000.00 plus interest. C.A. App. 354-358.

4. The complaint in the instant case (C.A. App. 9-11) was filed on November 1, 1989. Petitioner alleged that the NSA's actions and statements between 1968 and the 1987 date of formal acquisition of the property had so drastically impaired petitioner's use of the property that they had effected a taking.[2] Petitioner alleged that the government had engaged in a continuous pattern of covert and overt conduct with the intent to interfere with

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[2] The complaint giving rise to this appeal was initially filed as a counterclaim against the government in the United States' condemnation action. The United States District Court for the District of Maryland held that it was without jurisdiction over the counterclaim and transferred it to the Court of Federal Claims.

petitioner's development and use of its land; that while none of the government's actions would individually have constituted a total and permanent taking giving rise to a claim for inverse condemnation, the accumulated actions had effected a taking; and that the government had intentionally interfered with petitioner's investment-backed expectations of developing the property in order to acquire it at a fraction of its true value. *Id.* at 10. Petitioner sought $300 million for the alleged temporary taking. *Id.* at 11.

After a four-day trial, the Court of Federal Claims held that petitioner had not established a temporary taking. Pet. App. A1-A43. The court noted that "[u]nder a takings analysis, the court must consider three factors: (1) the character of the governmental action; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the economic impact of the regulation on the claimant." *Id.* at A25 (citing *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986)). In conducting that analysis, the court first concluded that the government had not negotiated in bad faith during the period in question. Pet. App. A26-A29. The court also determined that neither the NSA's dealings with county officials nor its stated intention to condemn the property was the cause of petitioner's failure to develop the land. The court expressly found both that "there [was] insufficient evidence that the government's opposition to the development during the county approvals process actually impeded the development," *id.* at A38, and that "there [was] insufficient evidence that alleged threats to condemn the property actually prevented the development," *id.* at A37. Based on its "thorough review of the evidence presented at trial and the entire record," *id.* at A43, the court concluded that petitioner had "not established by a

preponderance of the evidence that the government's conduct caused [petitioner] to fail to develop its property and suffer economic loss as a result," *id.* at A42-A43.

5. On appeal, petitioner argued that (1) the Court of Federal Claims had abused its discretion by basing its decision on an erroneous application of the three-prong takings test articulated in *Connolly*, and (2) the trial court's findings were clearly erroneous and irrational. The court of appeals affirmed summarily in an unpublished order. Pet. App. B1-B2.

ARGUMENT

1. Petitioner's arguments amount, in essence, to a scattershot attack on the factual findings of the Court of Federal Claims. Unless the actions of the federal government *caused* petitioner to fail to develop its property, petitioner cannot possibly establish a taking, no matter what the economic consequences of the failure to develop and no matter what the nature of the challenged government action. The Court of Federal Claims determined, however, that the requisite causal link had not been shown to exist. While recognizing that the lack of development on petitioner's land served the NSA's interests, the court concluded—based on its "thorough review of the evidence presented at trial and the entire record" (Pet. App. A43)—that petitioner had "not established by a preponderance of the evidence that the government's conduct caused [petitioner] to fail to develop its property and suffer economic loss as a result." *Id.* at A42-A43. That conclusion is fully supported by the record, which shows that petitioner pursued a desultory course of action—obtaining various necessary development permits, allowing them to lapse, negotiating with the government to purchase the land and, generally, not moving forward with development

when it had the opportunity. In any event, petitioner's attack on the trial court's factual findings raises no issue warranting this Court's review.

Petitioner heavily relies (see Pet. 41-47) on the Court of Federal Claims' assertion that the NSA "preferred the property to remain vacant [but] found it could maintain security by other methods, such as restricting building heights and location or limiting construction to buildings with public access." Pet. App. A10-A11. Petitioner construes that statement as a "finding * * * that the Government, in furtherance of its security objective, interfered with [petitioner's] reasonable investment-backed expectations." Pet. 41. That interpretation is wholly implausible in light of the trial court's express conclusion that petitioner had failed to establish a causal nexus between the NSA's actions and petitioner's failure to develop its land. Rather, the Court of Federal Claims appears to have meant only that the NSA's security interests would have been served by development limitations short of a total ban—not that the NSA's actions actually effectuated such limitations.[3]

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[3] Petitioner cites *Benenson* v. *United States*, 548 F.2d 939 (Ct. Cl. 1977), for the proposition that "[i]t is neither logical nor prudent for a developer to continue to spend huge sums of money on developmental costs and infrastructure when the government has advised the landowner that it will take some interest in the property." Pet. 20. In *Benenson*, however, the property owner was actually forbidden to alter its property. *Benenson* concerned drastically extensive governmental regulation which resulted in a taking of the Willard Hotel in Washington, D.C. Although the existing building had no economically feasible use, plaintiffs were statutorily "enjoined from removing the facade of the building for the purpose of determining whether the structure of the building will permit a profitable use of the building for purposes other than the operation of a hotel." 548 F.2d at 947. In the instant case,

2. Equally unavailing is petitioner's claim that the courts below misapplied the takings analysis set forth in this Court's decision in *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986). Petitioner asserts that the trial court erred by (1) distinguishing between legitimate and illegitimate government actions and failing to consider whether the legitimate government actions constituted a taking (Pet. 48-51), and (2) failing to consider the total cumulative impact of all the government's actions on petitioner's reasonable, investment-backed expectations (Pet. 52-55). Those claims are baseless.[4]

a. In analyzing the character of the government's conduct, the Court of Federal Claims properly relied on *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1, 15 (1984), for the proposition that "[l]egitimate government action which impairs the market value of real property ordinarily does not amount to a taking." Pet. App. A32. The court distinguished between "legitimate governmental action" (such as filing a lis pendens or speaking at public hearings against a development or zoning change), see *id.* at A32-A33, and "government conduct which goes beyond legitimate government action and interferes with the legal rights of landowners." *Id.* at A33-A34. The court properly concluded that much of the NSA's conduct—such as its efforts to purchase the

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petitioner was in no way "enjoined" from development by the government's actions.

[4] BWPA's claim (Pet. 49) that the trial court erroneously relied on *Agins* v. *Tiburon*, 447 U.S. 255 (1980), is wrong. Immediately after the Court's only citation to *Agins*, the court articulated the *Connolly* test, and its subsequent analysis was based upon that test. See Pet. App. A26-A36 (character of the government conduct), A36-A41 (interference with reasonable investment-backed expectations), A41-A43 (economic impact of government action).

property, its public statements of opposition to proposed development, and its communications to county officials concerning its intent to buy the land—constituted legitimate government actions (as the court used the term). *Id.* at A34-A35.

The Court of Federal Claims did assert that "[s]ome of the government's actions may not fall under the rubric of legitimate actions." Pet. App. A35. It explained that "[g]overnment officials wielded substantial influence over the state highway planning decisions and intended at one point to use highway issues to persuade county officials to reject development. Government officials also cultivated a relationship with one county zoning official in order to enlist her support against the development." *Id.* at A35-A36. In determining whether NSA actions had substantially interfered with petitioner's reasonable investment-backed expectations, however, the court concluded that there was "insufficient evidence that the government's opposition to the development during the county approvals process actually impeded the development." *Id.* at A38.[5] It further concluded, on essentially the same basis, that "[b]ecause * * * the government's actions did not actually interfere with the development, * * * the government's actions had little economic impact on [petitioner]." *Id.* at A41. Thus, the court's application of the *Connolly* analysis was properly guided by its determination that petitioner had not established a

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[5] Indeed, the trial court noted that despite the NSA's opposition, petitioner "twice won sketch plan approval [and] once gained approval for an interim sewage treatment plant." Pet. App. A39. Petitioner simply failed to pursue its development opportunities after receiving the county approvals.

causal connection between the NSA's conduct and petitioner's failure to develop its land.[6]

There is simply no basis for petitioner's claim (Pet. 50) that "the [Court of Federal Claims] considered only those Government actions involving highway issues and the influencing of county officials to determine whether those two activities impaired BWPA's ability to develop its property." In the section of the opinion discussing "Interference with Reasonable Investment-Backed Expectations" (Pet. App. A36-A41), the court discussed several additional aspects of the government's conduct. For instance, while the court found that the government's statements of its intent to condemn were "legitimate," it also found "insufficient evidence that the alleged threats to condemn the property actually pre-

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[6] Petitioner does not contend that NSA officials attempted to prohibit the sale or development of its property through the invocation of federal law. Petitioner asserts, however, that "Government actions in opposing, thwarting and blocking development on BWPA's undeveloped land [were] analogous to a regulation which denied petitioner all economically beneficial and productive use of petitioner's land." Pet. 19. It is far from clear that the NSA's informal attempts to influence the decisions of county officials can be persuasively analogized to the enforcement of a federal statute or regulation having the force of law. See *De-Tom Enterprises, Inc.* v. *United States*, 552 F.2d 337, 339 (Ct. Cl. 1977) (per curiam) (court rejected plaintiff's claim that "the Air Force necessarily took plaintiff's property (in the constitutional sense) simply by persuading the County Board not to change the zoning of the property," explaining that the federal government "can be held responsible for a Fifth Amendment taking only when its own regulatory activity is so extensive or intrusive as to amount to a taking"). Resolution of that question is unnecessary to the disposition of this case, however, since the trial court found that those informal attempts were not in any event the cause of petitioner's failure to develop its land.

vented the development." *Id.* at A37.[7] The court specifically found that "[m]ost of the government's actions did not impede development; rather, BWPA officials chose not to pursue development aggressively." *Ibid.*

b. Nor is there any merit to petitioner's contention (Pet. 52-55) that the courts below examined each government action in isolation to determine whether any one had effected a taking. The Court of Federal Claims acknowledged petitioner's argument that "the totality of the government's actions" had effected a taking, Pet. App. A39, but concluded that petitioner had "not established by a preponderance of the evidence that the government's conduct caused [petitioner] to fail to develop its property and suffer economic loss as a result." *Id.* at A42-A43. Petitioner's disagreement with that basically factual conclusion—a conclusion based on the trial court's "thorough review of the evidence presented at trial and the entire record," *id.* at A43—provides no basis for this Court's review.

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[7] It is not clear in any event that the government's threat to condemn private property could ever effect a taking, even if it were determined that the prospect of condemnation deterred the landowner from undertaking development. As this Court stated in *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1 (1984):

> the likelihood that the United States would have responded in that fashion [*i.e.*, by exercising its condemnation power] to an attempt by petitioner to make productive use of the land weakens rather than strengthens petitioner's position, because it suggests that petitioner had the option, at any time, to precipitate an immediate taking of the land and to obtain compensation therefor as of that date, merely by informing the Government of its intention to [develop the property].

467 U.S. at 16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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